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Nos. 90-408 and 90-577
CONSOLIDATED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
Respondent.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
Cross-Petitioner,

v.

COUNTY OF YAKIMA and DALE A. GRAY,
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On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONERS/CROSS RESPONDENTS, COUNTY OF YAKIMA AND DALE A. GRAY, YAKIMA COUNTY TREASURER

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ARGUMENT

I. INTRODUCTION

Though several points discussed in the briefs of the Yakima Nation (hereinafter, the Tribe) and the United States warrant response, the most remarkable thing about all the opposing briefs is what they omit: a discussion of the unanimous understanding that has existed for a cen-

tury on the point at issue in this case; i.e., that tax status of Indian lands is a function of land tenure, with trust lands being exempt and fee lands being taxable. This understanding is reflected in the relevant acts of Congress from 1887 (Allotment Act), to 1934 (IRA Sec. 5), to 1940 (25 USC 352c), to 1964 (25 USC 608(c)); in Interior Department Land Decisions and Memoranda from 1924 (50 I.D. 691), to 1930 (53 I.D. 133), to 1989 (BIA.IA.0943); in the decisions of this Court in *Choate v. Trapp*, 224 U.S. 665 (1912), *Choteau v. Burnet*, 283 U.S. 691 (1931) and *Squire v. Capoeman*, 351 U.S. 1 (1956), not to mention *Goudy v. Meath*, 203 U.S. 146 (1906); in the federal regulation governing U.S. acquisitions of trust lands for Indians, 25 CFR 151.10(e); in the Government's own briefs to this Court in *Squire* and *U.S. v. Mitchell*, 445 U.S. 535 (1980); and it was the very basis for the litigation in *City of Tacoma v. Andrus*, 47 F. Supp. 342 (1978), in which the United States Interior Secretary was a party.

Most of the foregoing authorities were discussed in the County's opening brief and need not be revisited here. 25 USC 352c and two relevant Department of Indian Affairs memoranda, however, have not. They deserve mention.

25 USC 352c was enacted in 1940 as 54 Stat. 298. It authorizes the Secretary of Interior to refund, in some cases at least, property taxes imposed on lands patented to an Indian in fee "prior to the expiration of the period of trust without application by or consent of the patentee".[1] It also authorized the Secretary, in certain cases, to satisfy and release judgments for *state* or *county* taxes on such lands.[2] By engrafting 352c onto 25 USC Chapter 9

[1] Authority for such accelerated fee patents was the Burke Act (now 25 USC 349, first proviso).

[2] The full text of 25 USC 352c reads:

> The Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to reimburse Indian allottees, or Indian heirs or Indian devisees of allottees, for all taxes paid, including penalties and interest, on so much of their allotted lands as have been patented in fee prior to the expiration of the period of trust without application by or consent of the patentee: *Provided*, That if the Indian allottee, or his or her Indian heirs or Indian devisees, have by their own act accepted such patent, no reimbursement shall be made for taxes paid, including penalties and interest, subsequent to acceptance of the patent: *Provided further*, That the fact of such acceptance shall be determined by the Secretary of the Interior.
>
> In any case in which a claim against a State, county, or political subdivision thereof, for taxes collected upon such lands during the trust period has been reduced to judgment and such judgment remains unsatisfied in whole or in part, the Secretary of the Interior is authorized, upon reimbursement by him to the Indian of the amount of taxes including penalties and interest paid thereon, and upon payment by the judgment debtor of the costs of the suit, to cause such judgment to be released: *Provided further*, That in any case, upon submission of adequate proof, the claims for taxes paid by or on behalf of the patentee or his Indian heirs or Indian devisees have been satisfied, whole or in part, by the State, county, or political subdivision thereof, the Secretary of the Interior is authorized to reimburse the State, county, or political subdivision of such amounts as may have been paid by them.

(subject of allotment of lands), Congress acknowledged again in 1940 that the tax exemption of Indian lands was based on their *trust status* and that the taxes to which they became subject, upon termination of such status, included state and county taxes.

In 1989, the Office of the Solicitor for the Department of the Interior issued a memorandum on state taxation of reservation Indian fee lands, BIA.IA.0943. This 1989 memo (Appendix pp. 1a-3a) rescinded an earlier 1979 Solicitor's opinion (Appendix pp. 4a-5a) that 25 USC 349 authorized taxation of reservation Indian fee lands. This 1989 reversal of position stands in sharp contrast to the United States' assertions in this case that the State never had authority to tax these lands or lost that authority in 1948 with the enactment of 18 U.S.C. 1151. The 1979 memo was written to answer the property tax question presented here, in light of the then recent decision in *Moe v. Confed. Salish & Kootenai Tribes*, 425

U.S. 463 (1976). Division of Indian Affairs Associate Solicitor, Thomas W. Fredericks, there said:

> I am unable to agree . . . that Indian-owned fee land within reservations is exempt from state and local real property taxation.

and concluded:

> I think it is clear that the General Allotment Act and subsequent legislation, taken together, manifest Congressional understanding and intent that tax exempt Indian land depend [sic] upon its being trust or restricted land.

The Tribe and its amici, the United States and Mashantucket Tribe et al., offer several alternative theories on the taxation by states of reservation Indian fee lands. They may be summarized as follows: (1) The State of Washington (and hence Yakima County) has never had authority for such taxation; (2) the State once had this tax authority, but it was taken away by the combined weight of a series of Indian statutes adopted since 1934 and the policies behind them and; (3) the State once had this authority but it was taken away with the enactment in 1948 of 18 USC 1151. These theories are not only mutually inconsistent, but unsound even when examined separately. Theory 1 moreover is in conflict with a century of unanimity on the subject.

The United States cites *The Kansas Indians*, 72 U.S. (5 Wall) 737 (1867), *The New York Indians*, 72 U.S. (5 Wall) 761 (1867) and modern cases beginning with *McClanahan v. Ariz. Tax. Comm.*, 411 U.S. 164 (1973) (U.S. Brief, p. 18) for the proposition that tribal Indians and their property are presumptively beyond the reach of state authority. In *Kansas Indians* as in *New York Indians*, the state's lack of authority as to tribal Indian lands was based simply upon the language of the applicable treaty or convention. *McClanahan* cited *Kansas* and *New York* and refashioned their rules as a presumption of no taxation without Congressional consent. Yet the Court did not set forth this presumption as a pure and free-standing judicial principle. Rather it stated that

issues of state tax authority vis a vis reservation Indians are to be decided by reference to the applicable treaties and statutes, avoiding platonic notions of Indian sovereignty (411 U.S. at 172).

This is, of course, as it should be. Inasmuch as *Kansas Indians* and *New York Indians* are the source for the modern formulation, *McClanahan* merely recognizes that the treaties and executive orders creating the reservations all contain language of enduring tribal rights. The lesson of *Kansas Indians* and *New York Indians*, is that Indian tax immunities come from the treaties and statutes, rather than Indians' inherent status. Therefore, just as they are created by Congress (or executive order), they are subject to defeasance or limitation by Congress. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Yakima County submits that, at least here, where federal statutes address the issues, the proper judicial calculus does not even involve any presumption of Indian exemption.[3]

II. THE TRIBE ATTEMPTS TO ESCAPE THE RECORD

The Yakima Tribe attempts to confound the issues in this case and divert attention from the General Allotment Act and its tax provision, 25 USC 349, citing other statutes which may, in some other case, have authorized the alienation of reservation lands (Resp. Brief, p. 6, n.3). The uncontroverted affidavit of the County Assessor, however, establishes that the *only* Yakima Indian-owned realty inside the Yakima Reservation taxed by Yakima County is that realty previously patented in fee *under the Allotment Act* (J.A. 29-30). There are no other allotment or patenting statutes or mechanisms involved here.[4]

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[3] Indeed, the presumption in favor of taxation applied in most other tax cases would be more appropriate. In general, exemptions are construed in favor of the government and against the taxpayer. *Hale v. Iowa State Board*, 302 U.S. 95, 103 (1937).

[4] In any case, 25 USC 335, enacted in 1923, incorporated the provisions of the Allotment Act for the treatment of *all* lands purchased under Congressional authority for Indians. Though subsequent special exceptions have been created (e.g. 25 USC 409a), the Allotment Act clearly provides the general rule.

III. THE TRIBE DRAWS UNWARRANTED INFERENCES FROM *McCLANAHAN* AND *MESCALERO*

The Tribe relies on a passage from *McClanahan* for the proposition that there exists no statutory authority for taxing reservation Indian fee lands (Resp. Brief. p. 21). The passage implies that since Arizona lacked authority to tax the particular Navajo Reservation lands where a tribe member earned her income, the State would also consequently lack authority to tax such income. The passage reads:

> "However relevant the land-income distinction may be in other contexts, is plainly irrelevant when, as here, the tax is restricted because the state is totally lacking in jurisdiction over both the people and the lands it seeks to tax. In such a situation, the state has no more jurisdiction to reach income generated on reservation lands than to tax the land itself." (411 U.S. at 181)

The Tribe infers that states lack jurisdiction to tax any and all reservation Indian lands, in total disregard of the Court's words "when, as here" the State of Arizona lacked such jurisdiction. Lands inside the Navajo Reservation which had not been removed from trust status would therefore have been exempt from taxation by the State of Arizona and likewise, presumably, state tax on Indian income earned there. Reservation fee lands, of course, present a different question. There is nothing in the *McClanahan* opinion to suggest that Rosalind McClanahans" income was earned on fee land. Moreover, while holding that McClanahan's *income* was not taxable, the Court noted that the land-income distinction may be important "in other contexts". Such other contexts are created, for example, by statutes which refer expressly to the taxation of reservation Indian lands, as does Section 349.

The Tribe then moves on to cite *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), as confirming or summarizing the "breadth" of *McClanahan*. (Resp. Brief, p. 21). The passage quoted by the Tribe,[5] however, comfortably accommodates the tax authority asserted here, by referring to the "cession of jurisdiction or other statutes permitting" taxation of Indian reservation lands. 25 USC 349 is obviously just such a statute.

IV. THE TRIBE ATTEMPTS TO ELEVATE FEDERAL POLICIES OVER FEDERAL STATUTES

The Tribe contends that recent enactments aimed at "encouraging and strengthening tribal government" (Resp. Brief, p. 28, n.11) change the effect of 25 USC 349 as adopted in 1887 and amended in 1906. None of these recent statutes repeals Section 349 nor conflicts with taxation thereunder in any way. Rather, the supposed effects on Section 349 are the result of the congressional *policies* of encouraging tribal economic development and self-government which have animated Congress in recent years. By the same reasoning, taxes on export producers could be invalidated by Congressional policies favoring international trade, without the cumbersome necessity of statutory language on the subject of such taxes. If the operation of a specific tax statute is determined by the unspoken social policy of some *other* statute, then application of the U.S. Code becomes a hopeless exercise in reading the Congressional mind.

The Tribe contends that the adoption of the Burke Act and its proviso to Section 349 (according to which "restrictions as to the . . . taxation of [patented] land shall be removed"), had the purpose and effect of *delaying* the conferral of individual Indian citizenship until the issuance of a fee patent to land, while *hastening* the time when such patent could be issued. (Resp. Brief, p. 29-30). This interpretation fails to give any meaning to the text re-

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[5] The passage reads: "Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Mescalero* at 148.

garding *removal of tax restrictions.* Yakima County squarely asserts that this text of this statute has meaning.

V. THE TRIBE'S RELIANCE ON THE WASHINGTON STATE CONSTITUTION IS MISPLACED

The Tribe relies on Art. XXVI of the Washington State's Constitution taken from this State's enabling Act, 25 Stat. 656, for the proposition that lands of Indians who maintain tribal membership are therefore immune from all state taxation. (Resp. Brief, pp. 36-38). This contention must fail for several reasons.

First, Art. XXVI is a general state disclaimer of title to Indian lands combined with an acknowledgement of *Congressional control* for purposes which expressly included taxation, and with an exception from this control for certain lands of certain Indians. As explained by the Court of Appeals (Cert. Pet. No. 90-408, p. 9a), Congress' control over the subject was exercised with the adoption of the Allotment Act, Sec. 6 (now Section 349) and results in the taxability of these lands.

Second, the Washington Supreme Court has interpreted Art. XXVI to mean that the property of a federal instrumentality is subject to state taxation to the extent that Congress has consented to taxation. *Boeing Aircraft v. Reconstruction Finance Corp.*, 25 Wn.2d 652, 663, 171 P.2d 838, 845 (1946). That determination is a rule of decision for this Court under 28 USC 1652 and *A.F. of L. v. Watson*, 327 U.S. 582 (1946).

Third, the Yakima Tribe recently raised Article XXVI as a supposed barrier to Washington's assumption of limited civil and criminal jurisdiction over the Yakima Reservation under PL-280. *Washington v. Confed. Bands*, 439 U.S. 463 (1978). This Court there held that, where authorized by act of Congress, state statute was sufficient basis for the state exercise of on-reservation jurisdiction, and that the disclaimer of such jurisdiction in Art. XXVI did not constitute an independent barrier to such exercise.

Fourth, the exception to the state's deferral to Congress of property tax authority is for lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except lands specially exempted by Congress. This provision was apparently drafted with the Allotment Act in mind. Both the Washington Enabling Act and Art. XXVI were adopted in 1889, a mere two years after the Allotment Act, and the treatment of patented Indian lands is the same in each: patented lands are taxable after expiration of the trust but not before. From the timing and correspondence of the Allotment Act and Art. XXVI, it appears that in this context the severance of tribal relations means severance of communal relations *respecting the land* conveyed; i.e., the substitution of individual, unrestricted land title for the former relationship to commonly held tribal land.

VI. THE TRIBE WOULD PRE-CONDITION EFFECTIVENESS OF THE STATUTE ON FULFILLMENT OF THE STATUTORY OBJECTIVE

The Tribe argues that the tax provision of the Allotment Act should not be honored because the assimilation of Indians into the larger society, (the policy behind the Act) was never fully realized. (Resp. Brief, p. 39) Under this reasoning virtually no statute would be effective, since legislative purposes are not self-fulfilling. This argument, that the tax effects of the Allotment Act must either apply to the entire reservation or to none of the reservation, was also made by the State of Montana in *Moe, supra.*

Based on extensive fee patenting in the Flathead Reservation and the extent of assimilation of its tribal Indian residents, Montana argued for the taxation of all of them and all their personal property. This all-or nothing type of argument was rejected in *Moe* and should likewise be rejected here. The essence of Montana's argument was

that, since the end of the reservations and total assimilation of Indians were the policy objectives of the Allotment Act, and since substantial progress had been made toward these objectives on the Flathead Reservation, the Court should treat them as having been fully realized, despite the halting of the process by the IRA in 1934. Similarly, the Tribe here argues that, since the elimination of the reservations and assimilation of Indians into the larger society was interrupted before completion, the Court should now rule as if the Allotment Act and the many land patents granted under its authority had never happened. The argument is no better for winding back the clock here than was that for winding it forward in *Moe*.

As in *Moe*, this Court in *Rosebud Sioux v. Kneip*, 430 U.S. 584 (1977), considered the diminishment of reservation by means of specific federal Indian statutes aimed at such diminishment. In explaining its decision the Court said:

> The intent of Congress in the 1904, the 1907, and the 1910 Acts was to change the boundaries of the original 1889 Rosebud Reservation. Much has changed since then, and if Congress had it to do over again it might well have chosen a different course. But, as we observed in *DeCoteau v. District County Court*, . . . "[O]ur task here is a narrow one . . . [W]e cannot remake history". 430 U.S. 615.

VII. THE UNITED STATES MISCHARACTERIZES THE ISSUES AND HOLDING IN *MOE*

The United States, in describing the holding in *Moe*, says the case "specifically held that . . . . Section 6 does not authorize a state to tax reservation Indians who received fee patents to allotments." (U.S. Brief, p. 7) This is a distortion of the case and its holding. There was no discussion in the opinion of whether the Indians involved in *Moe* had received any allotments or any fee patents thereto. Rather the issues in and holding of this Court, as disclosed by the opinion, concerned applicability of Montana's cigarette license tax, cigarette sales tax and

personal property tax to the cigarette licenses, sales and personal property of all Indians in the Flathead Reservation, without regard to any allotment or land-patent history.[6]

The issue in *Moe* was not, as the United States asserts, whether the state could tax Indians, but rather whether it could tax the *issuance* of cigarette retailers' licenses *to them*, *sales* of cigarettes *by them*, and their *personal property itself*, in rem. Montana's theory in *Moe* would have required this Court to go beyond the holding in *Goudy v. Meath*, 203 U.S. 146 (1906) (upholding taxation of real property) and beyond the plain language of the general laws clause of the Allotment Act, Section 6. (allottee to be subject to civil laws of the state). *Moe* involved neither taxes upon the land nor upon an allottee, and the Court's rejection of Montana's argument there does not, and should not, resolve this case. In contrast to *Moe*, we are concerned here with (1) a tax directly on the land as referred to in the proviso to Section 6 and (2) with a tax on sales thereof by Indians. The tax on land, therefore, is outside the scope of *Moe* and within that of the statute.[7] The real estate excise tax is within the scope of the *Moe* rules on cigarette sales taxes, such that sales to Indians are exempt from taxation while those to non-Indians are liable to tax.

The United States contends that this Court's refusal to apply *Goudy* to the *Moe* case or to expand *Goudy's* reading of the general laws clause, Section 6, "forecloses Yakima County's attempt to impose the state property tax on Indian-owned fee lands on the Yakima Reservation by

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[6] The Court described the litigation in the District Court as "separate attacks on the State's cigarette sales and personal property taxes applied to reservation Indians." 425 U.S. 465. The one reference to land tenure actually involved in the case is as to the *trust* land on which Indian Joseph Wheeler's smoke shop was located. 425 U.S. 467.

[7] This same view is expressed in the 1979 Interior Department memorandum on the subject. (Full text *infra*, pages 5a-7a)

invoking the language of the principal clause of Section 6 . . ." (U.S. Brief, p. 10). The Government's contention, simply stated, is that *Moe* overruled *Goudy*. *Goudy* however, was decided on two separate grounds: (1) That removal of restrictions on voluntary alienation of the land carried with it the removal of restrictions on "involuntary alienation" by means of the tax lien (203 U.S. 149); (2) That the civil laws referred to in Section 6 included Washington's property tax laws. (Id.) Only the second ground was addressed in *Moe*. The first is still valid and is sufficient alone to dispose of the property tax issue here. Moreover, Yakima County believes that, in *Moe*, this Court recognized personal property taxes as a distinct issue from real property taxes under Section 6 and asks for the same recognition here.

Recognizing that the proviso of Section 349 was not addressed in *Moe*, the United States offers a three-step argument to deny that its removal of "restrictions as to . . . taxation" leaves the subject lands taxable. Its first assertion is that if the general laws clause does not permit taxation, then the proviso added to the statute in 1906 cannot do so, because a proviso is presumed to relate to the same "*subject matter*" as the principal clause (U.S. Brief, p. 12). Yakima County agrees that the general laws clause and the proviso of Section 349 both relate to the same subject, namely the extension of state power in consequence of issuance of an Indian fee patent. However, they do so in *different ways*. The principal clause is general, leaving some specific issues (such as that presented in *Moe*) to be resolved and it prescribes a 25-year wait for the removal of restrictions on an allotment. The proviso on the other hand, is very specific, leaving little or nothing to interpretation and it contrasts with the main clause by permitting the 25-year trust period to be shortened or waived.

In any event while this proviso relates in some way to the subject matter of the principal clause (as by nature any proviso should), its effect is not therefore limited to the effect of the principal clause. A proviso, after all,

does not merely illustrate, summarize or affirm its principal clause. Rather, in its proper role at least, it states an exception, limitation, or contrast to the principal clause. Rather, in its proper role at least, it states an exception, limitation, or contrast to the principal clause. The word "provided" when used in this context means a restraint modification or exception to the thing which precedes. Blacks Law Dictionary, 3rd Ed., 1968. The exception represented by Section 349's proviso is to the 25-year trust period for allotments as provided for in Section 348 and the expiration of said period in full, before fee patenting under the principal clause of 349.

Second, the United States argues that there is nothing in the statutes or common sense to justify different tax treatment of fee lands based on whether they remained in trust allotted status for 25 years (under the original statute) or a shorter period (under the 1906 proviso). On this point Yakima County agrees. Since restrictions as to taxation of the fee lands patented early (under the proviso) are thereby removed, taxability of these lands is inescapable. Consistent treatment of the full-term fee lands with the accelerated fee lands therefore requires that all be subjected to taxation. This indeed, was an unquestioned and fundamenal principal from at least the time of the Allotment Act until the *Moe* decision in 1976. Indeed, two years later, the United States recognized this at page 24 of its Brief for Petitioner in *U.S. v. Mitchell*, Docket No. 78-1756. Now the United States disingenuously rejects the century-old distinction between fee lands (as taxable) and trust lands (as exempt) in favor of recently concocted alternative theories.

The third step of this Section 6 argument (U.S. Brief, p. 12) is to invoke *Moe's* expression of disfavor for checkerboard jurisdiction. If reservation Indian fee lands are taxed while trust lands are exempt, the United States argues "the result would be a variant of the "checkerboard" pattern of state jurisdiction the Court rejected in *Moe*". This "variant" however, is the natural consequence of the statute's removal of "restrictions as to the

. . . taxation" of the fee lands, without a similar treatment of *personalty*, which was involved in *Moe*.

The checkerboard jurisdiction now before the Court was created according to the Allotment Act as intended by Congress. In similar fashion, Congress created a second source of checkerboard jurisdiction with the adoption of PL 83-280 in 1953. PL-280 authorized states to assume jurisdiction over certain criminal and civil matters involving Indians and arising within reservations. Checkerboard jurisdiction under PL-280 has been considered and approved by this Court in *Washington v. Confederated Bands*, 439 U.S. 463, 502. Though state authority under the Allotment Act (*Moe*) and PL-280 (*Bryan v. Itasca County*) has been narrowly construed, this Court has always given effect to the language of the statutes.

Yakima County acknowledges that checkerboard jurisdiction is problematical in some contexts where searching of real property records is impractical. However, such searches are in the very nature and essence of the real property tax assessment/collection function. The task of county tax officials in distinguishing fee lands from trust lands inside the reservation is practically the same as that of distinguishing exempt church properties or governmental properties, or partially exempt senior citizen-owned real properties [8] from other properties.

VIII. THE UNITED STATES OFFERS A THEORY OF PREEMPTION INCONSISTENT WITH THE SUPREMACY CLAUSE

An alternative theory offered by the United States (U.S. Brief, p. 14) is that a preemption barrier to taxation of these lands remains, despite the removal of restrictions as to taxation under Section 6. Preemption, of course, is based on the Supremacy Clause, as recognized in the *Moe* decision itself. 425 U.S. 480-81, n.17. It serves to prevent interference with a federal statutory scheme,

[8] RCW 84.36.381.

regarding a subject within Congress' control. Here the state actions of Yakima County are *consistent* with the statutory scheme regarding tax treatment of reservation Indian lands and in no way inconsistent with the numerous ameliorative Indian statutes cited at p. 22, n.21 of the Government's Brief. All these, in various ways, afford their own specific benefits to Indian tribes and/or members. But a general Congressional *purpose* to benefit Indians cannot legitimately be translated into an unspoken exemption from taxes where the *words* of the U.S. Code, expressing the specific will of Congress as to this particular issue, take away such exemption. Underlying federal Indian policies are obviously useful in interpreting Indian statutes but legislative policies do not, in any of themselves, have greater force than legislative text. The Supremacy Clause makes United States treaties and statutes the supreme law of the land, subordinate only to the Constitution.

The United States places particular reliance on the 1948 amendments to Title 18 of the United States Code as a basis for, in effect, implied repeal of the Section 6 proviso. (U.S. Brief at 19-21). This is patently meritless. Whatever the precise scope of "Indian country" prior to the amendments, the sole purpose of 18 USC 1151 was to provide a reasonably precise description of the territory to which certain federal criminal statutes apply. *See* H.R. Rep. No. 306, 80th Cong., 1st Sess. A91-A92 (1947). *See also, U.S. v. John*, 437 U.S. 634 (1978). The United States asserts that by expanding certain federal jurisdiction to include reservation Indian fee lands, Congress thereby cut off the State's authority to tax these lands. However, even *taxing* jurisdiction of one government does not necessarily defeat the concurrent taxing jurisdiction of another. *Cotton Petroleum v. New Mexico*, —— US ——, 109 S.Ct. 1698 (1989).

The United States argues that by applying the "Indian country" definition in *some* civil contexts this court has swept away the taxing authority over these lands granted

by Congress. The extension of non-tax judicial principles to this tax case, in derogation of a federal statute on the subject, is not supportable. Indeed, even *within* the subject area of Indian taxation, as observed by this Court in *Mescalero Apache Tribe v. Jones*, 411 US 145, 148 (1973), generalizations are particularly treacherous.

Finally, even if the 1948 definition of "Indian country" is deemed to bring taxation of the fee lands under federal jurisdiction, Section 349 still constitutes the exercise of that jurisdiction, such that all restrictions as to taxation thereof are now removed.

IX. THE UNITED STATES AND THE TRIBE WOULD DENY THE PLAIN MEANINGS OF THE WORDS "ALL", "TRUST", AND "FEE" IN THE STATUTES

The U.S. misleads with its contention that the restrictions on taxation removed by operation of the Section 6 are only those *imposed* by the Allotment Act itself. (U.S. Brief pp. 13-14) The words of the statute are, "all restrictions as to . . . taxation of said land shall be removed". The Government would interpret "all" to mean some but not others. This is nonsense, because (1) "all" means all and (2) there are no other restrictions as to taxation of these lands than the restriction inhering in federal trust status, so long as it exists.

The U.S., like the Tribe, interprets the former 25 USC 608(c) (before the 1988 and 1989 amendments) to have distinguished between tax treatment of lands based on their *location* relative to reservation boundaries, rather than on form of ownership. (U.S. Brief, pp. 24-25; Resp. Brief 34-35). But however appealing this might be from the standpoint of *policy*, the distinction made by Congress in the statute is between "*trust*" and "*fee*" lands as such, each of which types exists both inside and outside reservation boundaries. To transform the statutory criterion from land-tenure status to geographic location requires this Court to assume the legislative role.

X. THE UNITED STATES DISTORTS *SQUIRE v. CAPOEMAN*

The United States, while arguing against state tax authority over reservation Indian fee lands, asserts that *it* has such tax authority according to *Squire v. Capoeman*, 351 U.S. 1 (1956) (U.S. Brief, p. 15, n.13). It is clear from the *Squire* decision that exposure of the fee lands to taxation follows from the Allotment Act and, in particular, the proviso to 25 USC 349 (351 U.S. at 8). The bold contention of the United States is, in other words, that the statutes removal of "all restrictions as to . . . taxation" of these lands is effective for the United States but not for the states. There is no support in the statute, however, for this distinction, and indeed none in the United States' brief.

The United States attempts to gainsay *Squire* and the assertion of its Brief to this Court in that case (that the tax exemption of Indian lands ends when the trust status of the land ends) by reference to the historical fact that the taxes at issue in *Squire* predated the enactment of 25 USC 1151, the "Indian country" criminal statute. (U.S. Brief, p. 26) Yakima County would also emphasize, however, the historical fact that the Brief of the U.S. was submitted in 1955, seven years *after* the adoption of the "Indian country" statute. Moreover, the same position was expressed by the U.S. twenty-two years later in the case of *U.S. v. Mitchell* (see page 14, *supra*).

As to the *Mitchell* Brief, the Government contends (1) that the holding of allotments in trust under the Allotment Act (25 USC 348) serves to protect them from taxes though they are exempt, in any event, if located inside the reservations, and (2) that the supposed per se immunity of reservation Indian lands "does not alter that purpose". (U.S. Brief, p. 27). These assertions cannot be reconciled. If *all* reservation Indian lands are exempt from state taxation based on their location and regardless of trust or fee status, then the holding of

these lands in trust does *not*, as urged by the Government, serve the purpose of protecting the state tax exemption.

XI. THE UNITED STATES MISCONSTRUES THE COUNTY'S EXCISE TAX ARGUMENT

The United States asserts that the County "does not point to any statute" authorizing taxation of an Indian seller of land (U.S. Brief, p. 28, n.38). On the contrary, Yakima County considers 25 USC 349 to be such a statute, because of its language "all restrictions as to sale, incumbrance, or taxation of said land shall be removed". Yakima County submits that this broad range of restrictions excompasses the power to levy a real estate excise "*as to the sale*" and to encumber the property sold with a lein for the enforcement of such levy. Though the primary incidence of the Washington real estate excise tax is on the seller (RCW 82.45.080), the ultimate burden thereof, where not paid by (or chargeable against) the seller, is upon the property itself. RCW 82.45.070.

> **82.45.070 Tax as lien on property—Enforcement**
>
> The tax herein provided for and any interest or penalties thereon shall be a specific lien upon each piece of real property sold from the time of sale until the tax shall have been paid, ...

If there is any exemption, enjoyed by an Indian seller, against excise tax on his sale of land, this exemption does not bar the incumbrance of the land itself with a tax lien in view of the language of the statute, "whereby restrictions as to . . . *incumbrance* . . . of said land shall be removed" (emphasis added).

XII. CONGRESS IS THE PROPER FORUM FOR THIS TAX DISPUTE

There is one assertion of the United States with which Yakima County strongly agrees.

> "It is, of course, for Congress ultimately to balance the needs equities, and to determine whether state taxation should be authorized. (U.S. Brief, p. 28)

In the same paragraph, the Government asserts that the revenue implications of this case for the County as "relatively insignificant", while "the potential harm to Indian Tribes is great . . .". However, the outcome of this case will also affect a multitude of other states, counties, school districts, fire districts, and countless other entities and the revenue they may derive to defray the cost of Indian reservation services enjoyed by Indians and non-Indians alike. The fiscal importance of the taxing authority involved here, and the proper balance of its consequences as between Indian and non-Indian governments, is plainly a policy matter which should be resolved by the elected representatives of the People, with due regard to all those affected. The legislative process is designed for such purposes. The judicial process is not.

In any event, adverse economic effects of state taxes on a tribe has been argued and rejected by this Court as basis for tax exemption. *Washington v. Confed. Tribes*, 447 U.S. 134, 157 (1980).

CONCLUSION

Yakima County respectfully prays that this Court reverse the Court of Appeals and declare the county's authority to assess and collect the challenged taxes.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

BIA.IA.0943 Mar 20, 1989

Memorandum

To: Field Solicitor, Twin Cities

From: Associate Solicitor, Division of Indian Affairs

Subject: Taxability of Indian-owned fee lands on Indian reservations

In the attached memorandum dated March 22, 1979, the Associate Solicitor, Division of Indian Affairs, directed that your office not pursue claims on behalf of individual Indians who alleged that they had been unlawfully required to pay state taxes on fee lands that they owned within the boundaries of an Indian reservation. Because, for the reasons set out below, I have concluded that the legal conclusion in that prior opinion is in error, I am rescinding that opinion.

That a state may not, absent authorization by Congress, tax tribal members residing on an Indian reservation with respect to on-reservation activity is well-settled law. *Bryan v. Itasca County*, 426 U.S. 373, 376-377 (1976) (*Bryan*); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (*Moe*); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) (*McClanahan*); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (*Mescalero*).

Although none of the cited Supreme Court decisions has addressed an attempt by a state to tax Indian-owned land within a reservation, language in some of those decisions

suggests that a state is on weaker ground when it attempts to tax Indian ownership of land than when it imposes any other tax on Indians:

> However relevant the land-income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the State is totally lacking in jurisdiction over both the people and the lands it seeks to tax. In such a situation, the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself.

McClanahan at 181. *See also Bryan* at 376; *Moe* at 475-476; *Mescalero* at 148.

Our prior opinion, however, concluded that Congress had authorized state taxation of Indian-owned fee lands based on the following language from the General Allotment Act that is codified at 25 U.S.C. § 349:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; . . . Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple and thereafter all restrictions as to sale, incumbrance or taxation of said land shall be removed . . .

As our earlier opinion acknowledged, the Supreme Court has made it clear that the first portion of § 349 does not apply as each individual parcel loses its trust status, but only when all the lands have been allotted and the trust expired on all of them. *Moe* at 478-479 quoting *Mattz v. Arnett*, 412 U.S. 481, 496 (1973). Trust allotments continue to exist on virtually all reservations where allotments were made. As the federal district court pointed out when, in the attached decision in *Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima*, No. C-87-654-AAM (E.D. Wash. May 10, 1988), it held that Yakima County may not tax Indian-owned fee land on the Yakima Indian Reservation, the Supreme Court in *Moe* declined to read § 349 as creating checkerboard jurisdiction within a reservation. *Slip op.* at 5-6. The same point is made in the attached letter dated March 14, 1983, from the Oregon Assistant Attorney General, Tax Section, advising that Indian-owned fee property on Indian reservations in the state is exempt from ad valorem taxation.

The March 22, 1979, memorandum from this Division, however, focused on the proviso, which states that whenever a fee patent is issued all restrictions as to taxation are removed, and construed that language as giving permission to states to tax Indian-owned fee land on a reservation. That proviso, however, makes no reference to states, but simply removes any restriction on taxation that had been in place because of the trust status of the land. Although restrictions on taxation are removed when a fee patent is issued for an individual parcel, removing those restrictions does not give a state jurisdiction it does not otherwise have. Once that restriction is removed, such land would have the same status for tax purposes as any other Indian-owned property on the reservation. While such property is probably subject to tribal taxation, *see Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), it may not be taxed by the state. *Bryan, supra*; *McClanahan, supra*. For that reason it is the tribe—rather than the state—that acquires jurisdiction to tax allotted land when a fee patent is issued to an Indian.

In addition to the federal court decision in *Yakima*, described above, two state courts have addressed the issue of state authority to tax Indian-owned fee property on

an Indian reservation and both concluded that such land is exempt from state taxation. The Supreme Court of Arizona reached that conclusion in *Battese v. Apache County*, 630 P.2d 1027, 129 Ariz. 295 (1981) (*Battese*), with respect to an ad valorem tax and the California Court of Appeals held that the state may not impose its inheritance tax with respect to such lands. *Estate of Johnson*, 178 Cal. Rptr. 823, 125 Cal.3d. 1044, (1st Dist. Cal.App. 1981), *cert. denied*, 459 U.S. 828 (1982). The Idaho State Tax Commission, in the attached opinion dated June 8, 1982, and the Assistant Attorney General, Tax Division, of the Oregon Department of Justice in the opinion discussed above have agreed with the *Battese* decision.

To be sure, it is unlikely that Congress envisioned such a result when it passed the General Allotment Act in 1887. The expectation at that time was that implementation of the allotment policy would soon result in the disappearance of all Indian reservations. *Montana v. United States*, 450 U.S. 544, 559-560 n.9 (1981). That expectation may explain why Congress did not address jurisdictional issues, but it does not determine how such issues will be resolved today. The courts do not extrapolate legislative intent from such expectations, *Solem v. Bartlett*, 465 U.S. 463, 468-469 (1984), nor are they obliged in ambiguous circumstances to implement an assimilationist policy that Congress has since rejected, *Bryan* at 388-389 n.14 (1976).

Accordingly, we recommend that any claims on behalf of individual Indians that you have not pursued because of our March 22, 1979, memorandum be reevaluated in light of the conclusions in this memorandum.

/s/ Dennis Daugherty
DENNIS DAUGHERTY

Attachments

cc: All Regional Solicitors w/attachments

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Mar 22, 1979

Memorandum

To: Field Solicitor, Twin Cities

From: Associate Solicitor, Division of Indian Affairs

Subject: Taxability of Reservation Lands Owned by Indians in Fee

I am unable to agree with the position taken in the research paper enclosed with your memorandum of January 25, *i.e.*, that Indian-owned fee land within reservations is exempt from state and local real property taxation.

The research paper relies primarily on the principle of federal preemption of state power to tax, correctly stating that this method of analysis is the preferred one where state taxation questions are at issue. However, a fundamental aspect of the principle that Congress may preempt state taxation of Indians is that Congress may also give permission to the states to tax Indians or Indian property. Such permission has been given, with respect to real property taxation of fee lands, in 25 U.S.C. § 349.

In *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), the Supreme Court held that Indians within reservation boundaries are immune from state personal property taxes, vendor license fees, and cigarette sales taxes. In that case, the Court considered the general language in the part of 25 U.S.C. § 349 which provided that, upon the issuance of fee patents, allottees would become subject to *all* civil and criminal laws of the state. It found that this part of § 349 has been modified by or at least requires interpretation in light of later

legislation dealing with jurisdictional matters. This later legislation, the Court said, manifests Congressional intent to eschew checkerboard jurisdiction. Thus, the taxes at issue in *Moe*, which are civil laws of the state and fall within the scope of the first part of § 349, are inapplicable to Indians anywhere within reservation boundaries, regardless of the title status of land.

However, the same conclusion may not automatically be reached with respect to real property taxes, because those taxes are specifically addressed in a later part of § 349. The first proviso to that section provides in part that:

> "[T]he Secretary . . . may . . . cause to be issued to [an] allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of such land shall be removed. . . ."

The Supreme Court did not address this provision in *Moe*. In light of the specific taxing permission contained in the proviso, the Court's holding in *Moe* may not be extended to real property taxes, in the absence, at least, of a showing that the conditions existing with respect to those taxes are the same as those which led the Court to its conclusion in *Moe*, *i.e.*, that subsequent legislation has modified this part of § 349.

I do not believe it can be said that the taxing permission in this proviso has been modified by later legislation. Rather than legislating in a manner inconsistent with it, Congress, since the General Allotment Act, clearly appears to have acted upon the assumption that land owned by Indians in fee is taxable. Subsequent legislation relating to land acquisition or sale, where taxation is mentioned, generally equates tax-exemption with trust or restricted status. *E.g.*, 25 U.S.C. 409a, 412a, 465, 501, 403a-1; Act of July 24, 1956, 70 Stat. 626, § 3.

Section 349 applies, by its terms, to patents in fee issued for allotments. The Act of February 14, 1923, 25 U.S.C.

§ 335, extended the provisions of the General Allotment Act, including 25 U.S.C. § 349, to "all lands heretofore purchased or which may be purchased by authority of Congress for the use and benefit of any individual Indian or band or tribe of Indians." That statute has been construed to encompass lands purchased and taken in trust for individual Indians within the tax-exemption benefits of the General Allotment Act. *Stevens v. Cmnr. of Internal Revenue*, 452 F. 2d 741 (9th Cir. 1971).

Likewise, I think the taxing permission in § 349 must be construed to apply to purchased land, certainly where land is purchased and taken in trust, and for which a patent in fee is later issued. Although it might conceivably be argued that land purchased in fee and not taken into trust does not fall within this permission, I think it is clear that the General Allotment Act and subsequent legislation, taken together, manifest Congressional understanding and intent that tax-exempt status of Indian land depend upon its being trust or restricted land.

Your § 2415 cases which depend upon a theory of nontaxability of fee land should be removed from your case list.

/s/ Thomas W. Fredericks
THOMAS W. FREDERICKS